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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES

DEPARTMENT OF WATER AND POWER,

Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation;

FRIENDS OF THE EARTH, a corporation;

THE MONO LAKE COMMITTEE, a corporation;

and the LOS ANGELES AUDUBON SOCIETY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

IRA REINER

City Attorney

EDWARD C. FARRELL

Chief Assistant City Attorney
for Water and Power

KENNETH W. DOWNEY

Assistant City Attorney

Department of Water and
Power

1520 Legal Division

111 North Hope Street

Box 111

Los Angeles, CA 90051

(213) 481-6362

KRONICK, MOSKOVITZ,

TIEDEMANN & GIRARD

A Professional Corporation

ADOLPH MOSKOVITZ*

CLIFFORD W. SCHULZ

JANET K. GOLDSMITH

BETH ANN LANE

*COUNSEL OF RECORD

555 Capitol Mall, Suite 900

Sacramento, CA 95814

(916) 444-8920

Attorneys for Petitioner City of Los Angeles

Department of Water and Power

QUESTIONS PRESENTED

1. Whether the court below erred in interpreting and applying this Court's decision in *Illinois Central Railway Co. v. State of Illinois*, 146 U.S. 387 (1892), as prohibiting the California legislature from adopting a water rights system under which appropriative water rights affecting navigable waters are acquired free of any "public trust."

2. Whether a state court decision, which changes state law suddenly and unpredictably so as to convert vested property rights in water to revocable licenses to use water subject to its recapture by the State for "public trust" uses, constitutes a deprivation of property without due process in violation of the Fourteenth Amendment of the Federal Constitution.

PARTIES TO THE ACTION

Parties to the state court action were National Audubon Society, a corporation; The Los Angeles Audubon Society, a corporation; The Mono Lake Committee, a corporation; Friends of the Earth, a corporation; Department of Water and Power of the City of Los Angeles; State of California; California State Lands Commission; California Water Resources Control Board; United States of America; Southern California Edison Company, a corporation; June Lake Public Utility District; Lee Vining Public Utility District; and the following individuals: Lenore M. Brown, Dallas O. Burger, Miriam S. Burger, Bruce F. Clark, Corrine J. Clark, Martin Duker, Elsa M. Duker, Sandra L. Jenkins, William C. Jenkins, R. Gary Jones, Elizabeth S. Meteer, Thomas F. Metzger, C. Douglas Off, Theodore Off, Janice O. Simis, Rollin D. Wallace, and Natalie C. Wallace.

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OPINIONS BELOW

The decision of the California Supreme Court is reported at 33 Cal.3d 419, and modified at 33 Cal.3d 726a. The decision and modification are reproduced in the Appendix at pages 1-58. The prior decision and judgment of the lower California court, the Alpine County Superior Court, were not published; they are reproduced in the Appendix at pages 77-82.

JURISDICTION

The California Supreme Court entered its decision on February 17, 1983. A Petition for Reconsideration was filed by the State of California. The California Supreme Court modified its original opinion and denied reconsideration by order entered April 14, 1983. A petition for certiorari was, therefore, due July 13, 1983, but upon application of petitioner granted June 27, 1983, by Associate Justice Rehnquist, the time for filing the petition was extended to August 22, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3) and Rule 17.1 of this Court.

STATUTORY PROVISIONS INVOLVED

This case involves the extent to which the Fourteenth Amendment to the United States Constitution protects vested water rights acquired under Article X, Section 2, of the California Constitution and the California Water Code (relevant portions of which are reproduced in the Appendix at pages 83-92) against novel applications of the judicially created public trust doctrine.

STATEMENT OF THE CASE

The California Supreme Court decision abruptly took from petitioner City of Los Angeles the permanence and certainty of its state-granted, vested, appropriative water

rights in the Mono Lake Basin and subjected them to the recurring threat of reduction or revocation without compensation by engrafting onto them limitations imported from the public trust doctrine. The state court's ruling similarly threatens all rights in California to divert and use water from navigable sources or their non-navigable tributaries.

Since 1914, acquisition and administration of appropriative water rights in California have been governed by a comprehensive statutory scheme codified in the state Water Code and buttressed by a 1928 amendment to the State Constitution. App. 83. Under this scheme, appropriative rights to surface water are acquired by application to the State Water Resources Control Board (hereinafter "Water Board"). If a permit is granted and the water is diverted and used reasonably and beneficially as authorized by the permit, the appropriative right vests as a permanent right revocable only for failure to comply with the conditions stated in the permit or for failure to continue making reasonable and beneficial use of the water. Los Angeles' water rights which are the subject of this litigation were acquired and have been used for more than forty years in accordance with this statutory scheme.

Los Angeles' Mono Basin Water Rights

Los Angeles, the second largest city in the United States, is located on a semi-desert coastal plain. Assuring an adequate water supply is a critical need for its over three million residents. Local waters can satisfy only about fifteen percent of the population's water requirements. Therefore, projects have been constructed to import water from distant sources pursuant to appropriative water rights. About seventeen percent of Los Angeles' total sup-

ply is diverted from non-navigable streams which are tributary to navigable Mono Lake, hundreds of miles north of Los Angeles.

Mono Lake is the terminus of a hydrologic basin with no outlet to the sea. Under natural conditions, all water from precipitation, surface runoff and springs within the basin (an annual average of approximately 170,000 acre feet) flows into the lake and evaporates. The lake's surface elevation and size remain relatively constant when the average annual evaporation equals the average annual inflow.

In its natural state Mono Lake has become more than twice as salty as the ocean due to thousands of years of evaporation and consequent concentration of salts in the remaining water. No fish can survive in its waters; the only living things in the lake are brine flies and brine shrimp, and various forms of algae upon which they feed. The brine shrimp and brine flies in turn provide food for both the migratory birds that stop at the lake and for the birds that nest there. Chief among the nesting birds is the California Gull, a common species that inhabits the coastal waters but breeds inland at sites such as Mono Lake and the Great Salt Lake.

Los Angeles first proposed diverting water from the Mono Basin in the 1920's, when it became evident that its other water sources would need augmentation. In 1934 Los Angeles filed two water right applications with the Water Board for permits to appropriate the waters of Walker, Rush, Parker, and Lee Vining Creeks, four of the principal tributaries to Mono Lake, for municipal use and hydroelectric power generation. In the middle of the Great Depression of the 1930's, the people of Los Angeles voted their approval of \$38 million in bonds to extend its existing

aqueduct system northerly into the Mono Basin to gather water from these creeks.

The proposed Mono Basin diversions were given significant protection by the United States. In 1931 Congress withdrew all public lands in the Mono Basin from entry or disposal "for the purpose of protecting the water sheds now or hereafter supplying water to the City of Los Angeles. . . ." Act of March 4, 1931, P.L. 864, 46 Stat. 1530. This safeguard was reinforced by a second Act of Congress granting the City the right to purchase Federal lands in Mono County for any necessary purpose of the City. Act of June 23, 1936, P.L. 759, 49 Stat. 1892.

In 1940, after conducting investigations and hearings, the Water Board approved Los Angeles' water right applications and granted permits thereon. In 1941 Los Angeles completed construction of the facilities necessary to bring the water to the City. These facilities included diversion works, conduits, Grant Dam and Reservoir, and an eleven-mile tunnel to the City's existing aqueduct in Owens Valley.

During the 1960's, to meet its constantly increasing need for water, Los Angeles constructed a second aqueduct from the Owens Valley-Mono Basin area. The second aqueduct and related hydroelectric generating facilities, costing about \$143 million, were put into use in June 1970, and diversions from the Mono Basin pursuant to Los Angeles' water right permits were then increased from an annual average of about 70,000 acre feet to an average of about 100,000 acre feet per year.

In 1974 Los Angeles submitted proof to the Water Board that it was making full beneficial use of the water diverted under its permits. The Water Board then issued Licenses Nos. 10191 and 10192 confirming that the City's Mono Basin

appropriative water rights had become perfected and vested by use. App. 93-104.

From the time the City's Mono Basin diversions were first proposed in the 1920's, it has been known that by decreasing inflow to Mono Lake such diversions would gradually reduce the level and size of the lake until a new balance was reached between the decreased inflow and the decreased evaporation from the lake's reduced surface area.¹ As a result of Los Angeles' diversions, lake levels have lowered an average of about a foot a year since 1940. The lake is expected to stabilize eventually at about two-thirds its present size with a surface area of 38 square miles.

The Challenge to Los Angeles' Water Rights

In 1979 respondents National Audubon Society and a number of associated organizations and individuals (hereinafter "Audubon") sued Los Angeles to enjoin the Mono Basin diversions. *National Audubon Society, et al. v. Department of Water and Power of the City of Los Angeles*, Alpine County Superior Court No. 566. Audubon did not allege that Los Angeles had violated the terms of its permits or licenses or that its diversions or uses of water thereunder were unreasonable or non-beneficial. Instead, the action was based primarily on the theory that a public trust protects the water of Mono Lake for fish, wildlife, recreation, navigation and other in-source uses against alleged adverse effects of the lowering of the lake level caused by Los Angeles' diversions for out-of-source uses.

¹Because of this expected decline in the level of the lake, in the 1930's Los Angeles spent over \$5 million to acquire the lands and littoral water rights of private owners who would be affected.

Audubon contended, in particular, that continued reduction in the lake's size will increase salinity to the point that the brine shrimp and brine flies can no longer survive, that the availability of safe nesting sites for the California Gull will be drastically reduced, that exposed lakeshore alkali dust will impair air quality, that navigation of small recreational craft will be rendered more hazardous, that local climate and scenic values will be adversely impacted, and that the opportunities for scientific research will be curtailed. These feared consequences are sharply disputed by some scientific studies.

Los Angeles cross-complained for adjudication of water rights in the Mono Basin, joining as defendants all other basin water users and claimants of water rights, including the United States and the State of California. The United States removed the action to the federal district court for the Eastern District of California. Los Angeles moved to remand the action to the state court because it believed at that time that all the issues were state law issues. The District Court denied the motion for remand but, applying the federal abstention doctrine, stayed the action and directed Audubon to seek resolution in the state courts of two issues which the federal court believed involved only issues of state law, the principal one being:

What is the interrelationship of the public trust doctrine and the California water rights system in the context of the right of . . . [Los Angeles] to divert water from Mono Lake pursuant to permits and licenses issued under the California water rights system? . . . Stated differently, can the plaintiffs challenge . . . [Los Angeles'] permits and licenses by arguing that those permits are limited by the public trust doctrine, or must the plaintiffs challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not "reasonable or bene-

ficial" as required by the California water rights system?

App. 61.

In obedience to the District Court's order, Audubon filed this action in the Alpine County Superior Court for a declaratory judgment. On the principal issue, it prayed for a declaration that it could challenge the legality of Los Angeles' diversions on the independent ground of violation of the public trust, without regard to the California water rights system.

The State answered the complaint and then filed a motion for summary judgment contending on the principal issue that, in relying upon the public trust doctrine, Audubon's complaint failed to state a cause of action. The State argued that the legislatively-created appropriative water rights system completely and exclusively defines the circumstances under which water may be diverted for use,² and that the public trust doctrine has no independent legal force in such a context.

Los Angeles answered Audubon's complaint, filed a cross-complaint to determine its rights under its water

²The legislative scheme provides that *all* water of the State, unless already being used pursuant to riparian or appropriative rights, is subject to appropriation. Water Code Sec. 1201. An appropriative right is initiated by application to the Water Board, which secures its priority date. Water Code Secs. 1225, 1450, 1455.

The Water Board then decides whether there is unappropriated water and whether an appropriative water right permit should be granted to the applicant. In making this decision, the Water Board is required to take into account the public interest in stream maintenance, fish and wildlife protection and other environmental concerns. Water Code Secs. 1243, 1243.5. Members of the public have the right to protest applications based on public interest considerations. Water Code Sec. 1330, 23 Cal. Admin. Code Sec. 719. The Water Board has the discretion to condition or even reject an application when in its judgment the public interest so warrants. Water Code Secs. 1255, 1257.

right permits and licenses, and supported the State's motion for summary judgment.

Audubon opposed the State's summary judgment motion and filed its own cross-motion for summary judgment as prayed for in its complaint.

The Alpine County Superior Court awarded summary judgment in favor of the State and Los Angeles, holding on the principal issue that:

The plaintiffs have failed to state a cause of action. The California water rights system is a comprehensive and exclusive system for determining the legality of the diversions of the City of Los Angeles in the Mono Basin. . . . The Public Trust Doctrine does not function independently of that system. This Court concludes that as regards the right of the City of Los Angeles to divert waters in the Mono Basin that the Public Trust Doctrine is subsumed in the water rights system of the state.

App. 77.

Audubon sought and was granted immediate review of the Superior Court's judgment by the California Supreme Court, which then reversed the judgment. On the principal issue, it held for the first time that perfected appropriative water rights in California are subject to repeated reconsideration, and to reduction or revocation without compensation if a new look persuades the Water Board or a court that the authorized diversions should be curtailed because they adversely affect public trust uses of navigable waters:

[T]he public trust imposes a duty of continuing supervision over the taking and use of the appropriated water . . . [T]he state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

App. 41.

Based on this radical new interpretation of the public trust, the California court concluded that Audubon "can rely on the public trust doctrine in seeking reconsideration of the allocation [to Los Angeles] of the waters of the Mono Basin." App. 51.

How the Federal Questions Were Raised and Decided

In its decision, the California Supreme Court considered and decided the two related federal questions on which this petition is based.

First, applying the public trust doctrine enunciated by this Court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), it judicially repealed the right, under California's statutory scheme, to obtain permanent vested rights to divert and use water from navigable streams. In so doing, it ignored this Court's later ruling in *Appleby v. City of New York*, 271 U.S. 364 (1926), that *Illinois Central* was only a statement of Illinois state law, *Id.* at 393-95, and elevated it to a position of paramount federal law.³

The California Supreme Court thereby created a new kind of higher law, based on a United States Supreme Court precedent, which prevails over contrary state law. In so doing, it converted a question of State law—the relationship between the public trust doctrine and the California

³Respondents opposing this petition may argue that, in light of the *Appleby* decision, the California Supreme Court did not apply federal law, but only interpreted a state common law doctrine. But it could not have reached the result it did by applying only state common law. California law, Civil Code Sec. 22.2, incorporates only so much of the common law "as is not repugnant to or inconsistent with" the State Constitution and statutes, which are the expression of "the supreme power" of the State. Civil Code Sec. 22.1. Thus, the state statutes which created the appropriative right system and authorized grants of fully vested property rights in water diversions could not have been overridden by the state's common law. Only paramount federal law could have accomplished that result.

water rights system—into a federal question—whether the California court correctly interpreted and applied a decision of this Court as overriding the State's statutory water rights law.⁴

Second, the California Supreme Court held that this new rule subjecting Los Angeles' perfected appropriative water rights to reconsideration and reduction in order to reallocate the water for public trust uses does not constitute a taking of property without compensation in violation of due process guarantees of the federal Constitution.⁵

⁴This determination of federal issues is set forth in the decision at App. 24-30. See also the quotations from the California Court's opinion *infra* at 18-19.

⁵That it considered and ruled on this federal constitutional question is apparent from the following excerpts from its opinion:

... [A]ccording to DWP [the City of Los Angeles Department of Water and Power], the recipient of a [Water] board license enjoys a *vested right* in perpetuity to take water without concern for the consequences to the trust. (Emphasis added.)

App. 38.

[T]he state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state ... applies to the water tributary to Mono Lake and *bars DWP or any other party from claiming a vested right* to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. (Emphasis added.)

App. 4.

In *State of California v. Superior Court (Fogerty)*, *supra*, 29 Cal.3d 240, 249, we stated that owners of shoreline property in Lake Tahoe would be entitled to compensation if enforcement of the public trust required them to remove improvements. By implication, however, *the determination that the property was subject to the trust*, despite its implication as to future uses and improvements, *was not considered a taking requiring compensation*. (Emphasis added.)

App. 29.

It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin. *No vested rights bar such reconsideration*. (Emphasis added.)

App. 43.

The Special Importance of this Case

The importance of stable and secure water supplies in the water-scarce western United States is almost axiomatic. Decisions of both this Court and the California Supreme Court have recognized that certainty of water rights is essential to proper planning and efficient use of the resource. *Arizona v. California*, U.S., 103 S.Ct. 1382, 1392 (1983); *People v. Shirokow*, 26 Cal.3d 301, 310 (1980); *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 354-56 (1979).

Because of this need for certainty, California and the other western states have developed comprehensive statutory systems to confer assured water rights, by providing that competing water demands and public interest considerations be balanced *before* the right is conferred. Hutchins, *Water Rights Laws in the Nineteen Western States*, 312-13, 320, 323-42 (1971). The result of these state enactments has been a universal understanding and expectation that the appropriative water rights thus obtained are permanent and incontestable. That expectation was shattered by the California Supreme Court's decision in this case.

The impact of this decision will be widespread and profound. Since appropriative water rights affecting navigable waters are the common foundation for much of the municipal and agricultural water supplies in this state, the decision deeply affects not only Los Angeles and its over three million inhabitants, but also millions of other Californians.

We are unable to catalog exhaustively the California cities which rely for their municipal supplies on water rights which would be subject to curtailment under the Cal-

ifornia Supreme Court's decision. Even a quick survey, however, shows them to include every major metropolitan area of the State—Los Angeles, San Diego, Sacramento and the San Francisco Bay Area (including the cities of San Francisco, San Jose, and Oakland).

Two huge water development systems upon which much of California's irrigated agriculture depends have also been built in reliance on state-granted appropriative water rights now subject to partial or total cancellation under the California Supreme Court's decision. The federal Central Valley Project appropriates from the navigable Trinity, Sacramento, American, and San Joaquin Rivers and Sacramento-San Joaquin Delta to sustain the irrigation of millions of acres of farmland in the agriculturally rich Sacramento and San Joaquin Valleys. California's State Water Project, in addition to supplying municipal needs in both the San Francisco Bay Area and southern California, provides irrigation water for large acreages of farmland in the San Joaquin Valley by appropriations from the navigable Feather River and Sacramento-San Joaquin Delta.⁶ Local public water districts in California have also built many smaller storage projects on navigable streams or their tributaries to provide water for irrigation based on similar appropriative water rights.

⁶The Sacramento-San Joaquin Delta, from which both the state and federal projects divert water, has long been the center of the state's fiercest political and environmental water battles. See, e.g., *Westlands Water Dist. v. United States*, 700 F.2d 561 (9th Cir. 1983); *United States v. California*, 694 F.2d 1171 (9th Cir. 1982); *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979), *rev'd* 451 U.S. 287 (1981); *United States v. California*, 529 F.Supp. 303 (E.D. Cal., 1981). The state court's public trust decision, by providing endless *de novo* consideration and reconsideration of the appropriative rights involved, has insured that the thorny issues will never be finally settled.

Billions of dollars have been invested in these projects. Repayment of this public investment depends upon the delivery and sale of the water supplies for which they were constructed, which in turn depend upon the security and reliability of their water rights.

Western power supplies are also heavily dependent on appropriative water rights. Major power producers, both public and private, rely on water stored in mountain reservoirs which affect navigable waters to provide significant portions of the power they sell. For example, Los Angeles' Mono Basin water rights at issue here produce hydroelectric energy equivalent to about half a million barrels, or about twenty million dollars' worth, of fossil fuel annually. Enormous reliance, both financial and practical, has been placed on hydroelectric power supplies, and thus on the stability of the water rights upon which they are based. Loss of these supplies means increased dependence on fossil fuels with higher power rates and increased air pollution.

In addition to the severe potential financial impact of the California court's decision, all diverters affected by the court's decision will face the problem of obtaining replacement water for the water which they may be prevented from diverting. For example, Los Angeles already faces possible cutbacks of other water supplies. The State Water Project, the only readily available alternate source, has contractual commitments which exceed its present supply and itself may face public trust challenges to its diversions.

Finally, the California Supreme Court's decision has ramifications beyond this state. The same conflict between proponents of in-source water use and those who rely on state-granted out-of-source diversion rights is repeated throughout the western states. If the *Illinois Central* doc-

trine prohibits state grants of permanent vested water rights to divert from navigable streams, or if state courts may suddenly destroy the vested nature of such water rights, then water supplies of all other western states, which rely on the prior appropriation doctrine, have also been severely undermined. Among the water projects in those states are many federal reclamation, flood control, and water supply projects, founded on appropriative water rights, which the United States has constructed at the cost of billions of dollars.

The tremendous economic, human and environmental impacts of the California Supreme Court's startling decision warrant issuance by this Court of a writ of certiorari to review the federal questions raised by the decision.

ARGUMENT

I

PRIOR TO THE CALIFORNIA SUPREME COURT'S DECISION IN THIS CASE, ALL RELEVANT PRECE- DENT HELD THAT PERFECTED APPROPRIATIVE WATER RIGHTS WERE VESTED PERMANENT PROPERTY RIGHTS IN CALIFORNIA AND OTHER WESTERN STATES

A basic characteristic of appropriative water rights is that, once perfected by use, they become vested, permanent, property rights immune from reduction or termination as long as the water continues to be diverted and used reasonably and beneficially as authorized by the appropriative permit and license. This characteristic has been acknowledged by informed commentators, established by the California statutory scheme governing appropriation of water, and declared by court decisions in California and throughout the semi-arid western states.

One of the early texts on western water law stated:

. . . while the title of the public or the state to the unappropriated waters of the stream can only be divested as to the portion thereof segregated and appropriated to beneficial uses, when this has been legally done the appropriator becomes the proprietor of the water appropriated and diverted, or of the use thereof, which is the same thing; and *so long as the beneficial use is continued the water remains the subject of exclusive ownership and control and is the property of the appropriator in every legal aspect.* (Emphasis added.)

3 Farnham, *The Law of Waters and Water Rights*, 2090 (1904). See also 2 Kinney, *Irrigation and Water Rights*, 1313-14 (2d. ed. 1912).

More recently, Wells A. Hutchins, one of the leading authorities on western water law, described appropriative water rights under California law as follows:

The first appropriator of water from a particular watercourse in point of time has the prior exclusive right to the use of the water to the extent of his appropriation, without material diminution in quantity or deterioration in quality, whenever the water is available. Each later appropriator has a like priority with respect to all those who are later in time than himself. *The appropriative right relates to a specific quantity of water, and is good as long as the right continues to be exercised.* (Emphasis added.)

Hutchins, *The California Law of Water Rights*, 40 (1956).

The California constitutional and statutory code sections reproduced in the Appendix, App. 83-92, establish the principles quoted above. They expressly encourage the fullest possible use of the waters of the State for reasonable and beneficial purposes and assure permanency of appropriative water rights.

To carry out this program, California's appropriation statutes establish a two step process. First, a prospective appropriator is granted a conditional right (a permit) which allows one to construct the necessary storage and diversion works and begin using the water. Second, a final right (a license) is issued when the appropriator proves he has put the water to full beneficial use. A water right permit is effective as long as the appropriator complies with its stated conditions and diligently works to place the water to beneficial use. Water Code Sec. 1390. Upon completion of the necessary physical structures and proof of beneficial use of the water in accordance with the permit, the permittee is entitled to the license confirming his vested right to appropriate. Water Code Secs. 1600, 1610.

Even during the permit stage, the Water Board's authority to further condition or limit the right granted is limited. But it terminates completely upon issuance of the license. Water Code Sec. 1394. A permit or a license may be revoked only for failure to comply with the stated conditions or failure to apply the water to reasonable beneficial use, Water Code Secs. 1240, 1611, 1627, and in any event only upon adverse determination following notice and hearing. Water Code Secs. 1241, 1410, 1675.

Nowhere in these sections or anywhere else in California constitutional or statutory law is there any authority, express or implied, to limit or terminate licensed appropriative rights on the ground that their continued exercise impacts public trust uses.

Before the California Supreme Court decision in this case, California court decisions have been uniform in acknowledging that appropriative water rights are property rights and permanent, absent a failure to use the water

reasonably and beneficially as authorized by the permit or license. The following are examples of such decisions:

Under the law of this state as established at the beginning, the water-right which a person gains by diversion from a stream for a beneficial use is a private right, a right subject to ownership and disposition by him, as in the case of other private property. All the decisions recognize it as such. Many of them refer to it in terms which can have no other meaning than that the right is private property.

Thayer v. California Development Co., 164 Cal. 117, 125 (1912).

Until East Bay's appropriative rights were created by permit, the water remained unappropriated. (Wat. Code, §§ 1202, 1253, 1375.) Only upon issue of permits did the appropriative rights come into existence. *The latter conferred permanent use and storage rights, subject only to divestiture by the state for failure to comply with conditions of law or of the permits.* (Wat. Code, §§ 1390, 1391, 1410-1415.) (Emphasis added.)

County of Amador v. The State Board of Equalization, 240 Cal.App.2d 205, 213 (1966). *See also Mt. Shasta Power Corp. v. McArthur*, 109 Cal.App. 171, 192 (1930) *aff'd* 9 Cal.2d 751 (1937).⁷

The decision of the California Supreme Court in this case is the only one we are aware of in California or any other western state holding that after an appropriative right has been perfected by use and confirmed by license, it may later be revoked by the State based on a determination that its exercise adversely affects public trust values.

⁷Other western states' decisions are in full accord. *See, e.g., Navajo Development Co., Inc. v. Sanderson*, 655 P.2d 1374 (Colo., 1982); *Hughes v. Lincoln Land Co.*, 27 F.Supp. 972, 973-974 (D. Wyo. 1939).

II

**THE CALIFORNIA SUPREME COURT ERRED IN AP-
PLYING THIS COURT'S DECISION IN ILLINOIS
CENTRAL RAILROAD CO. V. STATE OF ILLINOIS
AS DEPRIVING CALIFORNIA'S LEGISLATURE OF
POWER TO GRANT VESTED, PERMANENT APPRO-
PRIATIVE WATER RIGHTS**

Given California's explicit statutory and judicial rule that appropriative water rights are permanent, vested property rights, the California Supreme Court was forced to search for a new doctrinal basis to support its ruling that water rights affecting navigable water constitute only nonvested permissions which may be revoked to promote public trust uses. It fastened on the public trust doctrine enunciated by this Court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), and expansively and erroneously applied that doctrine to override the state's statutory water rights law and take back vested water rights granted pursuant to its comprehensive statutory plan of resource management.

The portion of the California Supreme Court decision headed "*Duties and powers of the state as trustee*" contains the clearest statement of the basis for its ruling. It stated first:

[T]he decision of the United States Supreme Court in *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, remains the primary authority even today, almost nine decades after it was decided.

App. 24.

It continued by stating that it "indorsed the *Illinois Central* principles" when it decided a case entitled *People v. California Fish Co.*, 166 Cal. 576 (1913), App. 26, and applied "the principles of *Illinois Central*" to uphold certain leases

in *Boone v. Kingsbury*, 206 Cal. 148 (1928). App. 27. It then concluded that the *Illinois Central* doctrine required the state to retain power to administer the public trust, "a power which extends to the revocation of previously granted rights or the enforcement of the trust against lands long though free of the trust." App. 29.

Illinois Central and the California cases applying its principles prior to the present case dealt solely with title to land. In the present case, the California Supreme Court extended the principles to water rights, with the result that perfected appropriative rights to divert from the source, long held to be vested property rights, can be reduced or revoked without compensation in favor of public trust uses at the source.

In *Illinois Central*, the Illinois Legislature in 1869 granted the railroad a one-mile wide strip of submerged land in Lake Michigan running along almost the entire Chicago waterfront. The operative language of the act stated that the lands were "hereby granted *in fee* to the said Illinois Central Railroad Company." (Emphasis added.) 146 U.S. at 448. The Court pointed out that the act gave the railroad total control of the development of one of America's most important ports:

The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor. . . . A corporation created for one purpose, the construction and operation of a railroad between designated points, is by the act converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

146 U.S. at 450-51.

In 1873, the Illinois Legislature repealed the 1869 Act and reasserted title to this submerged land. Litigation resulted to test the revocability of a grant in fee by a state to a private corporation. In a stinging rejection of the 1869 act, this Court said:

A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state.

146 U.S. at 453-54.

What is striking about the *Illinois Central* decision is the lack of any citation of authority for the proposition just quoted. Thus, it seems to be based on a concept of *natural law* which limits state legislative power. Nothing in the Illinois or the United States Constitutions prohibited the Illinois Legislature (which after all, was the body elected by the people of the state to act on their behalf) from deeding this land to a private party in fee. Yet this Court held that this simply could not be done.

Many commentators have analyzed the *Illinois Central* decision, the most prominent being Professor Joseph Sax in his 1970 law review article, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471. As Professor Sax opines, the true doctrinal basis for the opinion seems to be outrage; the act of the Illinois Legislature granting the submerged land in fee was "particularly egregious." 68 Mich. L. Rev. at 490. Professor Sax goes on to note:

But *Illinois Central* also raises more far-reaching issues. For example, what are the implications for the workings of the democratic process when such programs, although ultimately found to be unjustifiable, are nonetheless promulgated through democratic institutions? Furthermore, what does the existence of those seeming imperfections in the democratic process imply about the role of the courts, which, *Illinois Central* notwithstanding, are generally reluctant to hold invalid the acts of the co-equal branches of government.⁸

Id. at 491.

The implications of *Illinois Central* referred to by Professor Sax were startling when it was decided in 1892. But the implications of the California court's extension of *Illinois Central* in the present case to appropriative water rights, coupled with its enlargement of the uses protected

⁸These kinds of problems prompted this Court, in 1926, to limit *Illinois Central* by declaring it to have been simply an exposition of Illinois state law. *Appleby v. City of New York*, 271 U.S. 364. The California Supreme Court ignored *Appleby*, for to do otherwise would have left it with no basis for reducing California's statutory grants of vested water rights to historical footnotes. In order to elevate a common law public trust doctrine to a position of superiority over explicit statutorily created rights, the *Illinois Central* doctrine had to be rehabilitated as a prohibition of state legislative action.

by the public trust, are even more startling. At the time of *Illinois Central*, the protected uses were understood to be limited to navigation, commerce and fishing. In recent years they have been substantially expanded to include "preservation of the lands in their natural state" and the maintenance of conditions "which favorably affect the scenery and climate of the area." *Marks v. Whitney*, 6 Cal.3d 251, 259-60 (1971).

In this case the result deprives the largest city in California and the second largest in the nation of the permanent rights it has relied upon to serve seventeen percent of the domestic, commercial and industrial water needs of its people. But the rationale of the decision is applicable not only to other appropriative rights affecting navigable waters in California, but westwide throughout the states that have adopted the appropriation system of water rights. For as we have noted, the California court chose not to ground its decision on an interpretation of California's water rights statutes. Instead, in the face of the authorization by those statutes of permanent, vested appropriative rights, it held that the *Illinois Central* doctrine requires the state to retain continuing jurisdiction to revoke them without compensation in order to protect the public trust.

Justice White stated in April of this year when considering the allocation of Colorado River water rights:

Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles. Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered . . . [Citations omitted.] Certainty of rights is particularly important with respect to water rights in the Western United States. . . . The doctrine of prior appropriation, the prevailing law in the western

states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

Arizona v. California, U.S., 103 S.Ct. 1382, 1392 (1983).

This is essentially what the California Supreme Court did. It went to the basement, dusted off this Court's nineteenth century *Illinois Central* decision, and expanded it to apply to appropriative water rights. In so doing, it destroyed the reliability of both public and private water supplies.

This Court should review the correctness of this novel interpretation and expansion of the *Illinois Central* decision, and clarify whether the doctrine of that case was meant to proscribe state legislative action creating vested property rights to diversions affecting navigable waters.

III

THE CALIFORNIA SUPREME COURT DECISION UNCONSTITUTIONALLY DEPRIVES LOS ANGELES OF VESTED WATER RIGHTS WITHOUT COMPENSATION

Whether this Court agrees with our analysis that the California court's public trust conclusions rested on *Illinois Central* as paramount federal law (*supra* at 9-10, 18-19), or decides that those conclusions may have rested solely on an interpretation of state law, the decision raises a federal question which should be addressed by this Court: Whether Los Angeles has been unconstitutionally deprived of vested water rights without compensation.

The Fourteenth Amendment prohibits courts, no less than other branches of government, from taking property without due process of law. *Chicago B&O RR. Co. v. City*

of *Chicago*, 166 U.S. 226 (1897). While states, through their courts, have authority to enunciate state law which defines what is property, they may not retroactively define it out of existence and thus avoid the responsibility of paying compensation for taking it. In his strongly worded concurring opinion in *Hughes v. State of Washington*, 389 U.S. 290, 294-98 (1967), Justice Stewart admonished state courts as to the limits of their constitutional powers.

Hughes involved a decision of the Washington Supreme Court which for the first time interpreted that state's constitution, adopted some eighty years earlier, as having terminated the littoral rights, including the right to accretions, of riparian landowners along the Pacific Ocean. The majority of this Court preserved the riparians' rights to accretions while avoiding the Fourteenth Amendment constitutional issue by holding that federal law, rather than state law, controlled.

In his concurrence, however, Justice Stewart directly confronted the constitutional issue raised by the Washington court's decision. Deference to a state court's pronouncements on property rights is inappropriate, he declared, where such pronouncements constitute "a sudden change in state law, unpredictable in terms of the relevant precedents." 389 U.S. at 296. Such cases may constitute an unconstitutional deprivation of property, against which this Court stands ready to defend the state court litigant:

[A] State cannot be permitted to defeat the constitutional prohibition against taking of property by the simple device of asserting retroactively that the property it has taken has never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. [citation omitted.]

389 U.S. at 296-97.

This case presents just such a federal question, for that is precisely what the California Supreme Court did. Because it felt that someone "ought to reconsider" the state's grant of Los Angeles' Mono Basin diversion rights, App. 43, it retroactively defined out of existence the vested, permanent nature of California appropriative water rights and authorized the state's reallocation of such rights to public purposes without the necessity of just compensation. This remarkable about-face in California water rights law was executed for the express purpose, as the California court candidly admitted, "*to clear away the legal barriers* which have so far prevented either the Water Board or the courts from taking a new and objective look at the water resources of the Mono Basin." (Emphasis added.) App. 51. In its zeal to secure reconsideration and reallocation of established water rights, however, one of the "legal barriers" the California Supreme Court removed was the federal Constitution's guarantee of due process of law.

The test for determining when a state court property determination has crossed the line from definition of property to deprivation of property has been variously articulated: whether the state court's decision was "startling," "sudden," or "unpredictable in terms of the relevant precedents," *Hughes v. State of Washington*, 389 U.S. 290, 296, 297 (1967), concurring opinion of Justice Stewart; whether it "rests upon a fair or substantial basis," *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944); whether it so departs from established principles as to be without substantial basis, *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 543 (1929); whether it presents a "novel view," inconsistent with earlier state court decisions, *Fox River Paper Co. v.*

Railroad Comm. of Wisc., 274 U.S. 651, 656 (1927); and whether it "is so certainly unfounded that it may properly be regarded as essentially arbitrary." *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1916).

Under any of these formulations, the California Supreme Court's unique decision in this case meets the criteria for unconstitutional deprivation of property.⁹ In subjecting all appropriative water rights affecting navigable waters to perpetual uncertainty, the decision stands alone. It is not only directly contrary to legislative policy promoting certainty in water rights, Water Code Sec. 109, and the historic judicial recognition of perfected appropriative rights in California as permanent, vested property rights; it is also inconsistent with the California Supreme Court's own recent decisions castigating uncertainty as "pernicious" because it frustrates the full utilization of water resources mandated by the State Constitution, *In Re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 355-57 (1978), and hampers effective water rights administration. *People v. Shirokow*, 26 Cal.3d 301, 310 (1980).

The decision is unprecedented and arbitrary, leaving both public and private rights in limbo, deprived of any predictable standards of protection and vulnerable to repeated "reallocation" according to the shifting judicial and political whims of the day.

⁹This is not a case in which a municipality seeks to overturn a legislative act of the state on due process grounds. This Court has held that municipalities have no due process protection against acts of the state legislature which has the power to create and abolish them. *City of Trenton v. New Jersey*, 262 U.S. 182 (1923). State courts, by contrast, have no such creative authority over the state's political subdivisions. In this case, Los Angeles seeks to overturn a state court decision and sustain the state's legislative acts.

The California Supreme Court decision in this case thus constitutes a sudden and unforeseeable change in state law which unsettles established rules of property law, defeats universally held expectations of inviolability, and expropriates valuable property rights for public purposes. Justice Stewart's conclusion in *Hughes* could have been written about the California Supreme Court in this case:

Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. . . . [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate. . . .

Hughes v. State of Washington, 389 U.S. at 298.

IV

THE CALIFORNIA SUPREME COURT'S DECISION IS RIPE FOR REVIEW AT THIS TIME

Respondents opposing this petition may contend that review of the state court's decision at this time is premature, arguing that no reduction of Los Angeles' diversions has yet been ordered and that the decision does not itself operate as a taking to deprive Los Angeles of any water. Such

an argument misses the point. The California Supreme Court's decision as it now stands operates, without any need for further proceedings, to transmute Los Angeles' previously secure title into a defeasible title, its permanent easement to divert into a mere revocable license. This divestment of Los Angeles' title is, itself, a taking of property. *See State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *see also Wood v. Lovett*, 313 U.S. 362 (1941); *Appleby v. Delaney*, 271 U.S. 403 (1926); *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (1978). Quantification of the damage caused by the loss of indefeasibility is not needed to demonstrate the deprivation.¹⁰

The California Supreme Court's decision should be reviewed without delay. The ultimate judgment in this case concerning the amount of reduction of Los Angeles' permitted diversions will not and cannot affect the impact of the decision as *stare decisis* nor recapture the indefeasibility of Los Angeles' water rights which it has destroyed. Postponement of review will only continue the unwarranted vitality and precedential value of the state court's decision. The issues will not be developed further in the course of the action; they are now as sharply focused as they ever will be. Under the circumstances, immediate review is imperative. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975), and cases cited therein.

¹⁰For example, the loss of the shield of *res judicata*, and thus the potential reduction of previously vested water rights, was considered by this Court to be sufficient to warrant immediate review in the recent case of *Nevada v. United States*, U.S. , 103 S.Ct. 2906 (1983), even though no actual reduction of water rights had yet been ordered. (*Id.* at 2910.)

CONCLUSION

The California Supreme Court has drastically and erroneously extended public trust principles announced by this Court more than ninety years ago. If allowed to stand, this expansive new interpretation will divest Los Angeles of the permanence and certainty of its valuable vested diversion rights needed to serve its people. Further, it will establish a precedent for the divestment of countless other appropriative rights in California and throughout the West, so that they may be devoted to public use without payment of compensation.

Because of the profound impact of this decision, Los Angeles urges that a writ of certiorari issue from this Court to review the federal question which the decision has raised.

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Respectfully submitted,

IRA REINER

City Attorney

EDWARD C. FARRELL

Chief Assistant City Attorney
for Water and Power

KENNETH W. DOWNEY

Assistant City Attorney
Department of Water and Power

KRONICK, MOSKOVITZ,

TIEDEMANN & GIRARD

A Professional Corporation

ADOLPH MOSKOVITZ*

CLIFFORD W. SCHULZ

JANET K. GOLDSMITH

BETH ANN LANE

*COUNSEL OF RECORD

*Attorneys for Petitioner City of Los Angeles
Department of Water and Power*